IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION	Civil Action No. 01-3624 (Consolidated)
	CLASS ACTION
MARK NEWBY, et al., Individually and on Behalf of All Others Similarly Situated, Plaintiffs, VS. ENRON CORP., et al., Defendants	
THE REGENTS OF THE UNIVERSITY Of CALIFORNIA, et al., individually and On Behalf of All Others Similarly Situated VS. KENNETH L. LAY, et al., Defendants.	

ORDER ON PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

#1192

Lead Plaintiff has filed a Motion to Preclude the Filing or Production of Documents Subject to a Protective Order. (Instrument No.1037). This motion has been filed before discovery has begun, and one of the arguments defendants make against it is that it is premature. Nevertheless, the defendants have made it clear that they want an umbrella or blanket protective order, shielding all forthcoming discovery from public gaze, pursuant to Rule 26(c).[1] There is a mountain of briefing on this motion, and the briefs make a variety of arguments about the discovery process, but the issue boils down to a simple one. Should the Court impose upon the parties a blanket protective order, shielding all discovery from public gaze unless a party shows it should not be so protected, or should the Court require the parties or individuals who wish their discovery shielded to show some reason for the protection.

Defendants point to a number of sample protective orders, all of which place the onus upon the party wishing to do away with the protective shield to show why the discovery should not be protected. All of these samples are protective orders

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[1]Rule 26(c) reads:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, ...

that have been agreed to by the parties. Of course, if the parties wish to agree to protect the discovery in a case, courts are almost always willing to accommodate their wishes by signing an agreed order, but these orders, and the fact that they are used extensively in litigation, are of no help to this Court in determining the issue raised.

Defendants also argue that it is easier, faster, and less costly for them to produce their documents, unexamined, to the document depository, and if they have to go through their documents to determine if there are any documents that are privileged or sensitive, then it is much more trouble for them to produce documents.

Defendants argue that many of the documents could contain trade secrets of the companies involved; they could contain attorney client communications that are privileged; they could contain sensitive and private personnel file information, tax returns, and information from third parties that should be kept secret by law or agreement. Moreover, these documents could prove annoying, embarrassing, or oppressive if they were made public. There has been no argument that these documents are not relevant to the case.[2] Indeed, there could not be such an argument made at this time because, except for a few sets of requests, discovery has not begun. Rather, the argument is that because some the documents may contain matters that

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[2]"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. . . ." Rule 26(b)(2), Federal Rules of Civil Procedure.

should be the subject of a protective order, all documents produced should be protected.

Lead Plaintiff is desirous of sharing the discovery it receives from defendants with the public and the press by putting some of the discovery documents on its web site. It argues strenuously that it should not be forced to abide by a protective order that forbids dissemination of the documents it obtains, and that the public has a hunger for and right to the information contained in the documents of this highly publicized case. Although the defense responds that it is not the plaintiff's place to do so, lead plaintiff makes many of the argument for the news gathering organizations who have sought leave to file amicus briefs on the matter.

The Fifth Circuit held in 1985, "A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal." *Harris v. Amoco Production Co.*, 768 F.2d 669, 683-684 (5th Cir. 1985). There is no question, then, that in the Fifth Circuit we start with a presumption that matters obtained through the discovery process are capable of being made public, although the discovery process itself may be conducted in private. *Seattle Times Co. v. Rhinehart,* 467 U. S. 20, 33 (1984). Other Circuits are in accord. In *Citizens First National Bank of Princeton v. Cincinnati Insurance Company* 178 F.3d 943, 945 (7th Cir. 1999), Judge Posner summed it up:

> Most cases endorse a presumption of public access to discovery materials, *e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, [24 F.3d 893, 897 (7th Cir. 1994)]; *Beckman Industries, Inc. v. International Ins. Co.*, 966 F.2d 470,475-76 (9th Cir. 1992), *Public Citizen v. Liggett Group, Inc.*, [858 F.2d 775, 788-90 (1st Cir. 1988)]'; *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162-64 (6th Cir. 1987); *In re Agent Orange Product Liability Litigation*, [821 F.2d 139, 145-56 (1st Cir. 1987)], and therefore require the district court to make a determination of good cause before he may enter the order. . . . Rule 26(c) would appear to require no less.

Similarly, the Ninth Circuit held in *San Jose Mercury News, Inc. v. United States Dist. Ct.*, 187 F.3d 1096, 1103 (9th Cir. 1999), "[i]t is well-established that the fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown," *citing In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 145.

The Rule 26(c), by its own language, and the case law, provide that the burden is on the party wishing to obtain a protective order to show that good cause exists for the order. To establish that good cause exists that "party must show that a specific prejudice or harm will result if no protective order is granted." *Phillips v. General Motors Corporation*, 37 F.3d 1206, 1210-11 (9th Cir. 2002); see also,

Beckman Indus. 966 F.2d 470, 476; *San Jose Mercury News, Inc.*, 187 F.3d 1096, 1102; *Citizen's First National Bank,* 178 F.3d 943,945.

Both *Phillips* and *Citizen's First National Bank* scolded the district or magistrate judge for failing to make a good cause analysis of the protective order. 307 F.3d 1206, 1211 and 178 F.3d 943, 945, respectively. Judge Posner reasoned

> the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding. . . .That interest does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case. . . . The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).

Citizens First National Bank, 178 F.3d 943, 945.

Judge Posner recognizes that in cases with large numbers of documents the district or magistrate judge is often not in a position to make the good cause determination on a document by document basis, but emphasizes that the party seeking protection must in good faith describe a "properly demarcated category of legitimately confidential information." *Citizens First National Bank*, 178 F.3d 943, 946.

This Court cannot, at this stage of the proceeding make a good cause analysis of any documents that have been or will be placed in the document

depository. It is incumbent upon the defendants in the case, if they want parts of their discovery protected, to move in good faith for a particularized protective order pursuant to Rule 26(c). Accordingly, it is hereby

ORDERED, ADJUDGED, and DECREED, that Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order is GRANTED to the extent that the Court will not impose a blanket protective order covering all discovery in this case.

Signed at Houston, Texas, this 18th day of December, 2002.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE